The University of Chicago Law Review

Review
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Source: *The University of Chicago Law Review*, Vol. 45, No. 1 (Autumn, 1977), pp. 255-262
Published by: University of Chicago Law Review
Stable URL: http://www.jstor.org/stable/1599207
Accessed: 08-03-2016 11:00 UTC

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REVIEW

Truman and the Steel Seizure Case: The Limits of Presidential Power. MAEVA MARCUS. Columbia University Press, New York, 1977. Pp. xiv, 390. $14.95.

Howard C. Westwood†

Rarely, perhaps never, has a judicial proceeding been the subject of such thorough and perceptive exposition as Mrs. Marcus has given the Steel Seizure case.[1]

Her story[2] begins with the invasion of South Korea on June 24, 1950. It ends on July 24, 1974, with the Supreme Court's decision in *United States v. Nixon*,[3] holding that a United States District Court can compel the President to produce tapes pertinent to a criminal conspiracy trial. In between, Mrs. Marcus provides an absorbing treatment of the roots, the course, and the aftermath of the Steel Seizure case. She recounts the clash that evolved in late 1951 and early 1952 between the steel companies and the United Steelworkers. Her review of the history of labor relations in the steel industry, congressional measures to deal with labor crises, and the programs developed by President Truman to cope with the economic problems of the Korean war sets the stage for her analysis of the case. Focusing on the interplay among the White House, the Steelworkers, and the companies' leaders, Mrs. Marcus discusses the crystallization of the presidential decision to seize the plants when the Steelworkers called a strike. She then details the lawyers' tactics, step by step, as the companies challenged the seizure through the courts. She presents the positions taken by the judges as the case moved at breakneck speed from an application for a temporary restraining order to the Supreme Court's decision, and tells of the public reaction as the case proceeded and of the immediate result of the final decision—a fifty-three day strike. The book culminates in an analysis of the influence of the case on the judicial resolution of later controversies, reaching a climax with the Nixon tapes case.[4]

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[1] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[2] M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977) (hereinafter cited without cross reference as MARCUS).

[3] 418 U.S. 683.

[4] *Id.*

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I especially appreciate Mrs. Marcus's meticulous research. Even though I was intimately involved in the litigation as one of the companies' lawyers, there is much in this book, gleaned from various intimate papers, including judges' diaries, that is new to me. Moreover, although Mrs. Marcus could not avoid some effort at interpretation, her work is more expository than most scholarly treatments of legal episodes. This makes the book especially rewarding; the reader feels close to the raw material. The author's lively, straightforward, even simple style grips the reader's attention and facilitates his understanding. The book is a most valuable contribution to our constitutional literature.

The story is significant mainly, of course, for its illustration of the unique tripartite distribution of power in our constitutional system. But there is a strong minor theme throughout: the lawyers' jousting to achieve positions of practical value to their clients. The lawyers on both sides of the case were faced with perplexing tactical problems from the outset—problems that continued through the petition for certiorari stage. Great constitutional principles are all very well and of enormous import to posterity, but they are determined in cases in which immediate client interests are at stake, and the lawyer's job is always to advance his client's interest. I recommend this book to the bar as a wonderfully enlightening study in litigation lawyering quite apart from the prominent place it should occupy in constitutional bibliography.

The steel industry's labor contracts had expired at the end of 1951 with negotiations for new ones at an impasse. At issue were many questions involving wages, the union shop, and contract terms. In light of the inflation caused by the Korean war, a wage increase admittedly was indicated, but management would not agree to any increase unless the Executive agencies responsible for curbing that inflation agreed to permit a compensating price increase. Thus the Executive was even more directly involved in the dispute than it would otherwise have been in the case of an industry playing a key role in the arming of the nation. After three months of no-contract operations, the Steelworkers finally called a strike. The principal stumbling block was the amount of the price increase that the Executive would allow.

For reasons that Mrs. Marcus fully delineates, President Truman chose not to follow any of the statutory procedures for handling such a crisis; instead, he attempted to avert the strike by seizing the plants pursuant to an asserted "inherent" Executive power.[5] Not

[5] MARCUS 75-80.

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very subtly, and with some less than candid statistics, the President sought to define the issue in terms of management's demand for an allegedly excessive price increase. It is only fair to recognize that the President was most legitimately concerned with the spectre of runaway inflation. But his effort to have the problem generally understood as one of management greed proved a signal failure. Instead, his assertion of "inherent" power is what charged the atmosphere of the case almost at once and to a degree that the lawyers for both sides were slow to measure.

Within minutes after the President announced his seizure order, two of the companies brought suit in the United States District Court for the District of Columbia seeking a temporary restraining order against the seizure, with process for a preliminary injunction to follow. The named defendant was Secretary of Commerce Charles Sawyer, who, at the President's direction, had taken over the plants with the authority to prescribe labor conditions. But since the companies complied with his request that their chief executives remain in charge of operations, and since the union at once called off its strike, the seizure, without more, was but a matter of bookkeeping. Sawyer, moreover, made it clear that bargaining over labor conditions would continue between management and the union and that he was not changing those conditions.

The TRO motion came before Judge Holtzoff, a technically sharp jurist. In denying the motion on the ground (among others) that mere seizure was not immediately harmful to the companies, the judge pointedly indicated that it might be a different matter were the companies to show harm. In other words, were Sawyer to seek to change labor conditions perhaps the companies would have a case for equity's intervention. Holtzoff's textbook view made a deep impression on all the lawyers.

The President had announced his seizure order in the late evening of April 8, 1952. The TRO was ruled on the next day. Other affected companies swiftly entered the lists. Motions for a preliminary injunction were scheduled to be heard by Judge Pine on April 24. Pine was a highly respected judge, not brilliant, but solid.

Consider the lawyers' problem on the eve of the argument to Judge Pine. Intensive efforts to achieve a settlement between the companies and the union had continued, but to no avail. Sawyer finally announced on April 20 that he would decree some wage increase, though timing and terms were left vague. The lawyers for the Government had to play for time. Sawyer's April 20 announcement changed the status quo as Judge Holtzoff had seen it, and it was the task of the Government's lawyers to avoid any court restraint. If they could not preserve a free hand to their client, Secretary Sawyer

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(that is, the President), there might be trouble. The Steelworkers had waited months for a wage increase, and expected to get it without waiting much longer. Were the court to enjoin Sawyer's wage action, the union might proceed to strike. In that event, in order to preserve the only apparent justification for the seizure—the maintenance of steel production—the President would have to go to court to have the strike enjoined. What a political and legal hornet's nest that would be!

For the companies' lawyers the job was to achieve an immediate restraint of government-imposed change in labor conditions. Once those conditions were changed, the union would have a higher floor from which to negotiate in the future. Even if at the end of the case—and distant that end might be—the companies' lawyers were to win a great victory to be enshrined in constitutional law casebooks for all time, their clients would nevertheless be the losers if the negotiating floor were raised in the meantime.

To the lawyers for both sides one thing seemed evident. On a mere motion for preliminary injunction it was most unlikely, not to say unthinkable, that the basic constitutional issue would be determined and the case finally decided on the merits. The issue had to be addressed persuasively on either side, of course, because the degree of apparent merit on each side would have a bearing on the question of whether *pendente lite* relief should be granted, but, as the law in the books seemed quite clearly to say, the issue could not be resolved so prematurely.[6] For the companies' lawyers there was the additional worry that an action in equity (as distinguished from a leisurely lawsuit in the Court of Claims) might not be the appropriate vehicle for a determination of their rights—a worry the government's lawyers were sure to intensify.

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[6] Mrs. Marcus states that the Government lawyers made a mistake by filing a brief with Judge Pine that "emphasized too strongly the question of the President's constitutional power to seize private property." *Id.* at 111. But the question had to be well briefed. The Government's real mistake was its parroting of a Government brief in a World War II seizure case—the Montgomery Ward case—in which the issue was the war power. United States v. Montgomery Ward & Co., 150 F.2d 369 (7th Cir. 1945) (cited in MARCUS at 302-03 n.51). The Korean "war" was not—as the Government, of course, had to admit—a constitutional war; there never had been the requisite Congressional declaration. Nor was the atmosphere in 1952 anything like that of 1944 and 1945. Hence the thrust of the Government brief carried much too far.

The companies' brief also addressed the issue of constitutional power in some depth. Mrs. Marcus suggests that the companies' briefers were "taking their cue" from the Government brief. *Id.* at 111. That is not quite so. Their brief had to be largely formulated before the Government brief was received. But they did guess that the Government would closely track its brief in the Montgomery Ward case; they wrote accordingly, and their guess proved well founded.

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Mrs. Marcus vividly tells the story of the argument to Judge Pine on April 24 and 25. The judge caught all the lawyers flatfooted when, at an early stage, he indicated that he was going to decide the ultimate constitutional issue, with refinements of *pendente lite* law and equity's limitations cast aside. Pine was not Holtzoff. By the time Government counsel stepped forward, the bent of the judge's mind seemed evident. The Government forcefully sought to divert him, only to find that he was firm in his conviction.[7]

Just before five o'clock on Tuesday, April 29, Judge Pine released his opinion, holding that the seizure should be enjoined as constitutionally invalid. There ensued three nights and three days virtually unique in constitutional litigation. On Wednesday morning, Pine's order was entered, the Government's appeal noted, and the Government's motion to Pine for a stay pending appeal denied. In the afternoon, after announcing its intention to petition the Supreme Court immediately for certiorari, the Government moved for a stay by the Court of Appeals and the argument was heard *en banc*. That evening, shortly after conclusion of argument, the court, by a vote of five to four, granted a stay which was to last until four-thirty on Friday afternoon; if by that time the Government's petition for certiorari were filed, the stay would continue until the petition was passed upon.

At ten-thirty the next morning, Thursday, further argument was heard by the Court of Appeals on the companies' motion to amend the stay order with a condition that would prevent the Government from imposing any change in labor conditions. At one-thirty that afternoon, by the same five to four vote, the amendment was denied.[8] Significantly, however, Government counsel (by then

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[7] Mrs. Marcus seems to agree with the general criticism of the Government counsel's oral argument to Judge Pine (MARCUS 116-26), which a White House staffer purportedly stated was the "legal blunder of the century." *Id.* at 124-25. The criticism, in my view, has been unfair. At bottom, the criticism has been that Government counsel was unduly extreme in his assertions of the President's power and immunity. But the Government never was able to articulate a less extreme position, as the opinion of Mr. Justice Jackson demonstrates. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. at 640-41, 642, 646, 655.

[8] Mrs. Marcus makes one slight mistake. She says that after the announcement of the stay on Wednesday evening the companies' lawyers "detained Judges Stephens and Edgerton and begged that the order" be amended to include a condition against imposing a change in labor conditions. MARCUS 140. What actually happened was different. Though there had been much reference during the preceding argument to the need for preventing such a change the issue had not been highlighted, and the majority's stay order ignored it. The companies' lawyers, as the court left the bench, pointed this out to Chief Judge Stephens (of the dissenting four). The Chief Judge called Judge Edgerton (senior of the majority) back to the bench and in an informal colloquy it was agreed that, if the companies would file a motion for a condition the next morning, argument on it would be heard. That was done, and the next

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the Solicitor General), when pressed hard by questions from the bench, agreed that the Government would impose no change in working conditions before the filing of the petition for certiorari. Although that agreement would have had hardly more than overnight effect, nevertheless it placed the Government in an unfavorable psychological posture. If the Government could preserve the status quo until the matter was before the Supreme Court, it would have a harder time persuading the Court that the status quo could not be preserved long enough for the Court to consider the case.

The argument before the Court of Appeals, shaped by the judges' questions, was couched largely in *pendente lite* terms, with the fundamental constitutional issue receding from the prominence into which Judge Pine had propelled it. Although one can only speculate, it is all but certain that, if the appeal from the Pine order had ever been decided by the Court of Appeals, it would have been reversed without a final decision on the constitutional issue, and the companies would not have secured protection against an imposed change in labor conditions *pendente lite*. Though hindsight is never fair, one cannot but observe that the Government's great mistake may have been its decision to short-circuit the Court of Appeals. That decision was made at the highest Government level.[9]

When Judge Pine's opinion was announced on Tuesday, the Steelworkers at once called a strike, without awaiting the issuance of his order enjoining the seizure. On Thursday, with the action of the Court of Appeals, and at the President's request, the union called off the strike. Collective bargaining was to be resumed on Saturday at the White House.

At nine o'clock Friday morning, the companies themselves filed a petition for certiorari, to the amazement of the Government lawyers who later in the morning brought their petition to the Clerk of the Supreme Court.[10] Each side quickly responded to the other's petition. The position of the companies' papers was that the Court should prevent imposition of any change in labor conditions pending its review. The Government, of course, sought complete freedom.

So on Saturday, as collective bargaining at the White House resumed, the Justices conferred. That afternoon their order was issued, less than four weeks after litigation had been instituted.

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morning's argument was fully addressed, on both sides, to the critical issue of maintaining the status quo.

[9] MARCUS 135.

[10] Under the Court's rules as they then stood when both sides petitioned the plaintiff below had opening argument. The Solicitor General asked the Chief Justice to depart from that rule, but in vain. *Id.* at 144 n.63.

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Certiorari was granted, Judge Pine's order was stayed, *but* with the condition that the Government impose no change in labor conditions. The collective bargaining then became shadow boxing.

Tactics, at last, had ended. Argument was set by the Court for a week from the following Monday. Briefs were filed beforehand. The stage was set for a Supreme Court review that by then seemed destined to go, as had Judge Pine, to the basic constitutional issue. And so it did. The case was decided on June 2, a month to the day after the petitions for certiorari were presented.

The substance of the Steel Seizure case, not least the Supreme Court's decision, is likely to pale the story of the lawyers' tactics. But that story in itself merits telling, especially the story of those sleepless seventy-two hours as April ended and May dawned. It is a striking feature of Mrs. Marcus's book that that story comes through, meshed as it should be in the greater political and constitutional drama.

When now one looks back at that drama, with Mrs. Marcus's aid, and rereads the opinions of the Justices, one can only conclude that President Truman and his advisors were persistently blind to the implications of the position they sought to maintain. In reciting alleged precedents for the Executive's "inherent" power, the Government began with President Lincoln's seizure, in the absence of statutory authority, of the railroad between Annapolis and Washington after the outbreak of rebellion left the capital city isolated. The full story, however, is that no sooner had one of the nation's leading lawyers, Edwin Stanton, become Secretary of War in January, 1862, than he had a bill prepared to authorize the President to take over the railroads. Stanton then got a Senate leader, "Bluff Ben" Wade, chairman of the Joint Committee on the Conduct of the War, to sponsor the bill, with his committee's backing, and to steer it to prompt adoption.[11]

Lincoln was a consummate politician. Truman was no amateur, but for once he failed to grasp the essentials of constitutional relationships. He deliberately chose not to follow existing statutory procedures. That in itself was a serious enough challenge to the tripartite constitutional system. Truman, however, went even further. Although he reported to Congress immediately after the seizure and

[11] See the Journal of the Joint Committee for January 22, 1862, in REPORT OF THE JOINT COMMITTEE ON THE CONDUCT OF THE WAR, (part 1) 76-77, 37th Cong., 3d Sess. (1863); B. THOMAS & H. HYMAN, STANTON—THE LIFE AND TIMES OF LINCOLN'S SECRETARY OF WAR, 153-54 (1962). To preserve options both Stanton and Wade insisted that the President had power without legislation, but they left no doubt that they wanted the law.

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indicated his willingness to follow such mandate as Congress might then adopt, it was apparent that he was not inviting, and did not want, congressional action.[12] Moreover, after the argument in the Supreme Court and while the Justices were deliberating, Truman asserted in a press conference that the President had the power to seize and that Congress and the courts could not take it from him.[13] Although a spokesman issued a "clarifying" statement after the conference,[14] Truman could hardly have posed more sharply the frightening implications of some roving "inherent" Executive power—a power cloaked with an immunity to restraint. That the Steel Seizure case decision led, in time, to the Court's forcing President Nixon to produce his tapes,[15] shows how deeply embedded in our constitutional tradition is a proposition that Charles I never could fathom. Truman, too, fell short of understanding.

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[12] *See* MARCUS 94-95.
[13] *Id.* 176-77.
[14] *Id.* at 177.
[15] *See id.* at 246-48.

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